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NO. 1193

IN THE

Supreme Court of the United States

October Term, 1965

BROWN & ROOT, INC., *Petitioner*

-versus-

AMERICAN HOME ASSURANCE COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

ROBERT EIKEL
205 Oil & Gas Building
Houston, Texas 77002
Attorney for Petitioner

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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AMERICAN HOME ASSURANCE COMPANY,
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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

Brown & Root, Inc., in the District Court respondent and claimant of the Tug R. A. TURRENTINE, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming in part the interlocutory decree in admiralty of the United States District Court for the Southern District of Texas, Houston Division, in favor of libellant American Home Assurance Company and remanding the cause for further proof and consideration upon libellant insurance company's claim to recover from

petitioner its own company expenses. The trial court allowed recovery in full of the insurance company's own expenses in addition to the monetary losses of its insured, recovery of which was also allowed in full. The Court of Appeals held such full allowance of the insurance company's own expenses to be erroneous, and that the trial court should have allowed recovery only of such expenses as a reasonably prudent uninsured claimant would have incurred, to determine which the cause was remanded.

Opinions Below

The opinion of the Court of Appeals is reported at 353 F.2d 113 and appears *infra* Appendix, p. 21, et seq. The unreported opinion of the United States District Court is printed *infra* Appendix, p. 31, et seq.

Jurisdiction

The decision of the Court of Appeals for the Fifth Circuit was entered on November 31, 1965, and copy thereof is printed *infra* Appendix, p. 35. Thereafter petitioner presented to the Court of Appeals petition for rehearing, which was denied without further opinion on December 29, 1965, judgment thereon being entered on January 6, 1966.

Jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C. 1254(1).

Jurisdiction of the United States District Court for the Southern District of Texas lay under the Act of June 25, 1948, c. 646, 62 Stat. 931, amended Act of May 24, 1949, c. 139, Section 79, 63 Stat. 101, 28 U.S.C. 1333(1).

The Questions Presented for Review

This petition presents the following questions:

1.

An insurance company indemnifies a shipper against cargo losses. A casualty occurs to the shipment in transit. Immediately upon being notified by the insured, the insurance company engages its own agent and dispatches him to the scene of the casualty to investigate the circumstances of the loss and to determine its amount. He later supervises repairs to some cargo not competely lost.

After paying in full the amount of the insured's loss, the insurance company sues in its own name as subrogee to recover from a third-party this amount so paid the insured. In addition it sues to recover on its own account its own expenses, the sums it paid to its agent.

Can an indemnity insurance company recover from a third-party its own voluntarily incurred expenses *in addition* to the sums paid under the policy to its insured, or is the indemnity insurance company's recovery limited by subrogation only to the sums paid its insured, as expressly so held by this Court in *Phoenix Ins. Co. of Brooklyn v. Erie & Western Transportation Co.*, 117 U.S. 312, 6 S.Ct. 750 at 756 (1886), *Liverpool & G. W. Steam Co. v. Phenix Insurance Co.*, 129 U.S. 397, 9 S.Ct. 469 (1889), *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U.S. 223, 11 S.Ct. 554, 557 (1891), and *Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 175 U.S. 91, 20 S.Ct. 33 (1899)?

2.

A shipper, using its own prepared, printed short form bill of lading, delivers cargo for water carriage to a carrier

engaged only in transporting bulk cargoes on inland waterways. Cargo is lost under circumstances where the water carrier would be absolved from liability by provisions of the Harter Act.

The shipper's bill of lading expressly incorporates for ". . . rail or rail-water shipment", the Uniform Domestic Straight Bill of Lading which of course contains the exculpatory provisions of the Harter Act; and the bill of lading further provides "If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is carrier's or shipper's weight", a requirement of law for water shipments found only in the Harter Act.

Can a shipper so conditioning the terms of carriage rightfully contend that the bill of lading does not allow the carrier by water the Harter Act defenses, or is the shipper as the preparer of the bill of lading bound by such defenses under the settled rule that any ambiguities in written instruments are construed against the maker, as decided by this Court in *Calderon v. Atlas S. S. Co.*, 170 U.S. 272, 18 S.Ct. 588 at 591 (1898)?

3.

A company engages in the business of transportation of bulk commodities on the inland waterways, using to carry such commodities barges towed by tugs. It issues as carrier bills of lading to shippers. To perform these contracts of carriage it employs not only its own tugs and barges but on occasions tugs and barges which it charters from other companies.

Cargo is lost from a towed barge, the tug and the barge actually performing the transportation contracted for having been chartered by the carrier. The shipper named in

the bill of lading, through its subrogated insurance company, does not sue the carrier company but instead sues the tug owner, claiming negligent towage.

Is such transportation under a carrier's bill of lading affreightment, as held by this Court in *Sacramento Navigation Company v. Salz*, 273 U.S. 326, 47 S.Ct. 368 (1927), so that the tug owner is entitled to the carrier's defenses including those provided for in the bill of lading, or is the cargo owner entitled to avoid the bill of lading and sue the tug owner directly on the ground that the relationship was only towage?

4.

Where the undisputed testimony of the tug's crew was that the cargo was lost without any negligence when the barge stranded upon an uncharted shoal in the navigable channel, and such account of the stranding was corroborated and agreed to by the insurance company's own agent upon the basis of the investigation he made at the scene immediately after the stranding, and the claim of the insured under the policy adopted as its basis such account of the loss, and the trial court erroneously followed an earlier decision in a different case between the same parties and made no detailed fact findings, can the Court of Appeals make speculative findings of fact to affirm the trial court's judgment, contrary to the settled rule that speculation cannot do duty for probative facts, as so held by this Court in *Galloway v. United States*, 319 U.S. 372, 63 S.Ct. 1077, at 1089 (1943)?

Statutes Involved

The statutory provisions involved are primarily Sections 3 and 4 of the Harter Act, 46 U.S.C. §§ 192 and 193,

being the Act of February 13, 1893, c. 105, §§ 3 and 4, 27 Stat. 445, as follows:

"§ 192. Limitation of liability for errors of navigation, dangers of the sea and acts of God

"If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

"§ 193. Bills of lading to be issued; contents

"It shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described."

The other statutory provisions involved are certain portions of Sections 302 and 303 of the Interstate Commerce Act, Part III, Water Carriers, 49 U.S.C. §§ 902 and 903.

The pertinent portions of Section 302 are these:

"§ 902. **Definitions**

"For the purposes of this chapter—

* * *

"(c) The term 'water carrier' means a common carrier by water or a contract carrier by water.

"(d) The term 'common carrier by water' means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to chapter 1 of this title in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to chapter 1 of this title.

"(e) The term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) of this section and the exception thereto) by water of passengers or property in interstate or foreign commerce for compensation.

* * *

"(f) The term 'vessel' means any watercraft or other artificial contrivance of whatever description is used, or is capable of being, or is intended to be, used as a means of transportation by water.

* * *

"(i) The term 'interstate or foreign transportation' or 'transportation in interstate or foreign commerce',

as used in this chapter, means transportation of persons or property—

"(1) wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States;

"(2) partly by water and partly by railroad or motor vehicle, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States, and shall include transportation by water only insofar as it takes place from a place in the United States to another place in the United States;

"(3) wholly by water, or partly by water and partly by railroad or motor vehicle, from or to a place in the United States to or from a place outside the United States, but only (A) insofar as such transportation by rail or by motor vehicle takes place within the United States, and (B) in the case of a movement to a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein prior to transshipment at a place within the United States for movement to a place outside thereof, and, in the case of a movement from a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein after transshipment at a place within the United States in a movement from a place outside thereof."

(Section 902, (c), (d), (e), (f), and (i), Title 49 U.S.C.; Portions of Act of Feb. 4, 1887, c. 104, Pt. III, § 302, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 929.)

The pertinent portion of Section 303 is as follows:

> **"§ 903. Application of provisions; exemptions**
>
> "(b) Nothing in this chapter shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, on September 18, 1940, to the provisions of the Intercoastal Shipping Act, 1933, as amended."

(Act of Feb. 4, 1887, c. 104, Pt. III, § 303, as added Sept. 18, 1940, c. 722, Title II, § 201, 54 Stat. 931.)

Statement

Respondent American Home Assurance Company by its indemnity policy insured Dresser Industries and its subsidiary companies, of which Magnet Cove Barium Corporation and Magcobar, Inc., were such, against loss of and damage to their property while being transported by a carrier. Having paid its insureds Magnet Cove Barium Corporation and Magcobar, Inc., $31,430.49 for the full loss and damage to a shipment of drilling mud in cans shipped under a bill of lading with the carrier Magco Towing Co., American Home sued *not* the carrier but instead the owner of the tug which was towing the barge at

the time of loss. This suit was brought as subrogee under the loan receipt given respondent by its assureds. Libellant's Exhibit 22; R. 11 and 12.

In addition, respondent insurance company sued petitioner for the amounts it paid its own hired investigating surveyor and salvor, a Mr. Dierlam. R. 12.

The insured Magnet Cove Barium Corporation using its own printed short form bill of lading contracted with the carrier Magco Towing Co. for transportation of a cargo of drilling mud in cans from Brownsville to Corpus Christi, Texas. (The bill of lading, the pertinent language of which is identical in its several parts, appears at R. 90-94. A copy magnified for reading ease is attached as Appendix IV.)

The carrier Magco Towing Co. was a company which transported bulk commodities, on barges towed by tugs over the inland waterways of Texas and Louisiana. It was admittedly a contract water carrier and a private carrier. R. 138-139. Since it transported commodities for a number of corporate persons, R. 665-666, it was arguably a common carrier by water, though it had no certificate of convenience and necessity issued by the Interstate Commerce Commission since it was only a bulk commodity carrier and as such exempt by Section 903(b) of Title 49, U.S.C.

In the performance of its transportation contracts Magco Towing Co. sometimes employed tugs and barges it itself owned, and at other times it chartered and used tugs and barges owned by other companies. The cargo here involved was being transported aboard another owner's barge so chartered to Magco Towing Co., towed by a tug chartered from petitioner. R. 186, 236, 237.

The circumstances of the cargo loss were these:

The tug pushing the barge ahead of it was proceeding in darkness in a land-cut portion of the Intracoastal Waterway when the barge stranded on a shoal, and the barge tilted and dumped much of its cargo. The only witnesses to the stranding were the tug's captain and mate, who testified that the barge grounded on an uncharted shoal that was in the navigable channel, apparently built up by sand washing into the channel from the soft left bank. R. 557-559; R. 590-591. The stranding was a little to the left of the centerline, inside the channel. R. 565-566; 504-505; 591.

The cargo loss was immediately reported to the carrier who in turn notified the respondent insurance company. The next day respondent dispatched its own surveyor-investigator to the scene of the casualty (where the tug and barge had stayed). R. 371, 395. This agent of respondent viewed the canal and the banks and the vessels there, and he took statements from the crew and made photographs. R. 376, 377. Later at Brownsville he checked on the repairs made to salvaged cans. R. 386, 387.

Respondent's agent Dierlam testified he was told that the barge stranded on a shoal built up in the channel from bank sand drainage, and *not outside* the channel, and he so reported to his superior agents, R. 426, 427, referring them to the attached photographs he took on the spot. Please see particularly the two photographs marked Libellant's Exhibits 24 and 31 and Dierlam's notation on the latter photograph.

The assureds' proof of loss, Libellant's Exhibits 21 and 22, adopted respondent's agent Dierlam's account of the loss as having been caused by a stranding on the left side of the canal. R. 360-361. Only when the matter was being prepared for suit by respondent was the contention put

forward that the stranding occurred outside of the navigable channel limits. R. 426-427, 429.

The trial court followed another case of cargo lost at another time on another voyage, litigated between the same parties, affirmed by the Court of Appeals for the Fifth Circuit in 279 F.2d 811. The Court stated that the only difference between the cases was that in the instant case petitioner attempted in vain to show an oral agreement in the nature of deceit and estoppel. It then went on to "therefore hold as a matter of law that the tow (sic) was negligent in its handling of the barge", proximately causing the cargo loss.

In addition to allowing recovery of the respondent insurance company's payment of its insureds, the trial court further allowed in full the amounts paid the insurance company's surveyor.

With regard to the stranding and loss having been negligently caused, the Court of Appeals found the evidence "thin" but "thick enough" for a reviewing court. Acknowledging the admissions negating negligence in the reports made by the respondent's surveyor after his on-the-spot investigation, and in the assured's claim, it held these could lawfully be explained and retracted, and that while the oral testimony was clear that the barge stranded within the channel limits inferences could be drawn that the witnesses were in error where the center line was actually covered with water and therefore undisclosed, so that it was a permissible inference that the tug was negligent.

Expressing strong doubts about the legal basis for its own decision in the prior case between these parties, the Court of Appeals found here that the bill of lading was a contract of private carriage that did not expressly embody

the Harter Act defenses, and that the petitioner had not established to the satisfaction of the trier of fact that it was a beneficiary of the contract nor had secured for itself the Harter Act defenses.

On the allowance of the surveyor's fees and expenses, the Court held that for his services where he had acted solely for the underwriter the amounts paid the surveyor are certainly not recoverable. But it remanded the cause to determine to what extent the surveyor's actions and expenses "were reasonably attributable to the actions of a prudent uninsured cargo owner", which it held would be recoverable.

Reasons for Granting the Writ

1. The Court of Appeals holding that an indemnity insurance company can recover from a third-party tortfeasor some of the expenses it has deliberately incurred on its own account as though it were an uninsured cargo owner is a striking contradiction—how can an insurance company ever logically or reasonably have the status of an uninsured owner?

This decision is in direct conflict with the numerous decisions of this Court holding unequivocally that an indemnity insurance company when making claims against a third-party has the same rights, and no greater rights than, those of its insured. In *Phoenix Ins. Co. of Brooklyn v. Erie & Western Transportation Co.*, 117 U.S. 312, 6 S.Ct. 750, 756 (1886) this Court held that the insurance company had no rights against a third person except such as were its assured's saying:

> "Nor does this conclusion impair any lawful rights of the insurer. His right of subrogation, arising out of the contract of insurance and payment of the loss, is

> only to such rights as the assured has, by law or contract, against third persons."

This rule has been repeatedly affirmed, particularly in *Liverpool & G. W. Steam Co. v. Phenix Insurance Co.*, 129 U.S. 397, 9 S.Ct. 469 (1889), *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U.S. 223, 11 S.Ct. 554, 557 (1891), and *Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 175 U.S. 91, 20 S.Ct. 33 (1899). Many cases in accord from the American courts are collected in 29A Am. Jur., p. 799 (Insurance, §1720, Extent of Right, Dependence Upon Rights of Insured).

The decision below is in direct conflict also with a recent decision of the Court of Appeals for the Fifth Circuit itself, *Peoples Loan and Finance Corp. v. Lawson*, 271 F.2d 529 (5 Cir. 1959).

There are no decisions in accord with the holding.

Finally, this novel rule would if allowed to stand as lawful have wide-spread mischievous effects in insurance company claims against third persons: There would be no longer any certainty with respect to what sums with which a third-party would be legally confronted, and an insurance company could contend it was entitled to recover many of the normal expenses incurred in carrying on its business.

2. In holding that the towing tug could not have the same status of the carrier under the issued bill of lading the Court of Appeals clearly overlooked the express term of the bill of lading which here states (please see Appendix 37).

> "Received . . . the property . . . which said carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property) agrees to carry."

Since the whole basis of the suit against petitioner was that its tug and crew were in possession of the cargo when it was lost, plainly these contractual provisions make petitioner the carrier under the bill of lading.

Assuming here only for the purposes of discussion that the carrier named in the bill of lading was a private carrier and not a common carrier which would without agreement be entitled to the Harter Act defenses, it is respectfully submitted that the bill of lading taken as a whole undoubtedly embodied within its terms the provisions of the Harter Act. The intention of the parties was plainly to cover by this bill of lading the surface, water shipment contracted for. For rail, or "railwater" shipment the terms of the Uniform Domestic Straight Bill of Lading were expressly incorporated by reference. (The Harter Act defensive provisions of this Uniform Domestic Straight Bill of Lading are printed in Appendix____). That water carriage without joint carriage also by rail would be subject to the Harter Act provisions was contemplated is clearly shown by the provision

> ". . .If the shipment moves between two ports by water, the law requires that the bill of lading shall state whether it is 'carrier's or shipper's weight'."

The only transportation law where such a requirement occurs is in the Harter Act, which in Section 4 of the Act, 46 U.S. Code §193, requires that the bill of lading must state ". . . whether it be carrier's or shipper's weight": the draftsman of the bill of lading here lifted the words he used directly out of the Harter Act, plainly showing that the bill of lading was intended to be used for water carriage and to be subject to the provisions of the Harter Act.

But even if by use of the term "rail-water" the bill of lading be deemed ambiguous in its incorporation of the Harter Act defenses, any ambiguity in this regard must lawfully be resolved against the shipper Magnet Cove Barium Corporation, for it undoubtedly prepared the printed bill of lading and is bound by the rule as stated in *Calderon v. Atlas S. S. Co.*, 170 U.S. 272, 18 S.Ct. 588 at 591 (1898)

> ". . . A party to a contract is responsible for ambiguity in his own expressions, and has no right to induce another to contract with him on the supposition that his words mean one thing while he hopes the Court will adopt a construction by which they would mean another thing more to his advantage. Clark Cont. p. 593."

3. The trial court understandably held itself bound by the prior decision in *The R. A. Turrentine v. American Home Assurance Company*, 279 F.2d 811, 1960 A.M.C. 1429 (5 Cir. 1960), cert. denied, 364 U.S. 914, 81 S.Ct. 278, rehearing denied, 364 U.S. 944, 81 S.Ct. 458 (1961) to hold that the bill of lading contract between the insured and the named carrier Magco Towing Co. did not create a contract of affreightment but only as to the tug owner was a contract of towage. The decision in *Mississippi Valley Barge Line Co. v. T. L. James & Co.*, 244 F.2d 263, 1957 A.M.C. 1647 (5 Cir. 1957), cert. denied, 355 U.S. 871, 78 S.Ct. 121 (1957) on which The R. A. TURRENTINE was based the Court of Appeals now recognizes as in direct conflict with its decision (which was affirmed by this Court) in *River Terminals Corporation v. Southwestern Sugar & Molasses Co.*, 253 F.2d 922, 1958 A.M.C. 1534 (5 Cir. 1958), affirmed in part 360 U.S. 411, 79 S.Ct. 1210 (1959), and with decisions in other circuits.

Instead of holding, however, that consequently the undisputed facts here establish that the tug owner here is one and the same as the carrier and the cargo owner bound by the bill of lading terms and that the relationship here was one of affreightment, so that in this case which can only be one of negligent towage petitioner is entitled to be freed from liability under the Harter Act defenses, the Court of Appeals affirms the trial court on the ground petitioner failed to prove the necessary facts. This was manifestly not the case: It was undisputed and affirmed by libellant's witnesses that the bill of lading was issued, R. 294-297, 329, that Magco Towing Co. was a water carrier of bulk commodities on the inland waterways of Texas and Louisiana, R. 665, that it had other customers besides the allied corporations Magnet Cove Barium Corporation and Magcobar, R. 665, that it owned and operated in the performance of its carriage contracts its own tugs and barges and where necessary to fulfill its obligations to shippers that it chartered from others tugs and barges. R. 666. What further proof was lacking?

As a matter of law, since Magco Towing Co. held itself out to the shipping public to carry bulk commodities, Magco Towing Co. (in whose shoes of course rightfully petitioner stands vis-a-vis the cargo owner, as *Southwestern Sugar & Molasses Co. v. River Terminals Corp.* plainly holds) was a common carrier by water, Section 902(d), Title 49, U.S.C. (Section 302(d) of the Interstate Commerce Act, Part III, Water Carriers, printed supra), even though exempt from statutory requirements by reason of being a bulk carrier. Section 903(b), Title 49, U.S.C. Please see *Cornell Steamboat Co. v. U. S.*, 321 U.S. 634, 64 S.Ct. 768 (1944).

As a common carrier on inland waterways petitioner therefore had as a matter of law the Harter Act defenses. *Cornell Steamboat Co. v. U. S.*, 321 U.S. 634, 64 S.Ct. 768 (1944).

But even if Magco Towing Co. be deemed a private carrier, as shown above the contract under which the cargo here was being transported incorporated the defenses accorded a carrier by the Harter Act, *Koppers Connecticut Coke Co. v. James McWilliams Blue Line, Inc.*, 89 F.2d 865 (2 Cir. 1937), and the decision of the Court of Appeals is clearly contrary to the settled law.

4. In affirming the trial court by holding that the evidence was sufficient to support a finding that petitioner's tug was negligent in its navigation of the tug and barge, the Court of Appeals had no help or guidance from the trial court, which made no fact findings at all and simply held ". . . as a matter of law that the tow was negligent in its handling of the barge . . ." and thus caused the stranding.

Recognizing the settled law that a vessel is not at fault where it strands on an unmarked shoal within the confines of a navigable channel, *The Arlington*, 19 F.2d 285, 54 A.L.R. 101, 1927 A.M.C. 900 (2 Cir. 1927), *Exner Sand & Gravel Corp. v. Gallagher Bros. Sand & Gravel Corp.*, 157 F.2d 291, 1946 A.M.C. 1449 (2 Cir. 1946), nevertheless the Court of Appeals held "permissible inferences" allowed a finding of negligence.

Undoubtedly, as a matter of law, where the undisputed testimony of the tug's crew that the barge stranded upon an unmarked sand shoal within the confines of the navigable channel was corroborated by the insurance company's own agent who immediately investigated the cir-

cumstances of the stranding on the spot, taking pictures to support his conclusions, there can be no doubt that in basing its holding on inferences drawn from evidence not even arguably in direct conflict, the Court of Appeals' decision is directly contrary to the settled law that a finding must be based not upon speculation but on proof. It is in direct conflict with decisions of this Court, *Galloway v. United States,* 319 U.S. 372, 63 S.Ct. 1077, 1089 (1943) and *Kelly v. Jackson,* 6 Pet. 622, 631, 8 L.Ed. 523 (1832), the decision of the Court of Appeals of the District of Columbia, *Stone v. Stone,* 136 F.2d 761, 764 (1943), and as well also with its own decisions, *Reuter v. Eastern Air Lines,* 226 F.2d 443, 445-6 (5 Cir. 1955) and *Rooney v. Nuta, et al* (*Yacht Ronar*), 267 F.2d 142, 1960 A.M.C. 1212 (5 Cir. 1959), cert. denied 361 U.S. 884, 80 S.Ct. 156.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT EIKEL
205 Oil & Gas Building
Houston, Texas 77002
Counsel for Petitioner

APPENDIX I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21766

BROWN & ROOT, INC.,
Appellant
versus
AMERICAN HOME ASSURANCE COMPANY,
Appellee

Appeal from the United States District Court for the Southern District of Texas

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(November 23, 1965)

Before BROWN and COLEMAN, Circuit Judges, and MORGAN, District Judge.

BROWN, Circuit Judge: This case concerns the liability of a tug for loss and damage to deck-loaded cargo when the barge went aground on March 26, 1956, nearly a decade ago. As such, the cast of nautical characters is a replica of our earlier decision involving the Tug R. A. Turrentine,

the Barge LTC 6 and the Magnet Cove interests.[1] *The R. A. Turrentine v. American Home Assur. Co.*,[2] 5 Cir., 1960, 279 F.2d 811, 1960 AMC 1429, cert. denied, 364 U.S. 914, 81 S.Ct. 278, 5 L.Ed.2d. 28, rehearing denied, 364 U.S. 944, 81 S.Ct. 463, 5 L.Ed.2d 376.

Indeed, so the Tower[3] argues, this identity as to names, the underlying relation of the parties, the nature of the towing/transportation agreement was so stressed by cargo claimants that the trial Judge, perhaps mesmerized by this strange coincidence, was led to apply a sort of res judicata-collateral estoppel even though the operative occurrences —here a grounding in a channel and in the previous case a capsizing in a bay—were utterly different, calling for quite distinct legal theories of responsibility. This leads the Tower to attack the trial Court's finding of negligent grounding as clearly erroneous because not supported on the facts of this record. If this ground fails, it repeats its contentions unsuccessfully urged in the prior case that under the arrangement the Tug Owner was engaged in transportation, not mere towage, enabling it, first, to become the beneficiary of a bill of lading contract and, then, as a private carrier under it, to claim the benefit of the Harter Act and its error-in-navigation exemption, 46 USCA

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[1] Magnet Cove Barium Corp. (Shipper-Consignee); Magcobar, Inc. (cargo-owner); and Magco Towing Co., Inc. (the nominal carrier issuing the bill of lading).

[2] Although an earlier case as it hit the Courts and books, this involved a subsequent incident in June 1956 occurring in Corpus Christi Bay. There an attempt to shift the tug ahead of the barge after a towing cable parted resulted in the barge listing and the cargo going overboard.

[3] Brown & Root, Inc. was the owner of the Tug R. E. Turrentine. We use the term "Tower" in a conventional operational sense with no overtones as to the status of such "Tower" as one engaged in transportation of the cargo rather than simple towage. This issue is discussed later.

§192. By independent review of the first attack and stare decisis as to the second, we reject them and affirm.

We start out by agreeing fully with the Tower that under no circumstances may the earlier decision have any bearing on the Tug's responsibility for the dissimilar occurrence of March 26, 1956, here in suit. Apart from the Harter Act contentions arising out of the basic contractual arrangement, the Tug's legal liability turns on whether the Tug was negligent in respect of the grounding at this time, place and on this record, not the former one. We may agree also that the evidence is thin, but thin as it may be, it is thick enough considering our separate role. *Cf. Hughes Tool Co. v. Varel Mfg. Co.*, 5 Cir., 1964, 336 F.2d 61, 62.

The Barge LTC 6 with a 900-ton deckload of drilling mud, much in large steel containers and the remainder in pallet-stacked bags, departed from Brownsville bound for Corpus Christi by the Intracoastal Canal. The Tug was made up astern to push the Barge. All went well until about 10:00 p.m. The wind had been from the north, but then shifted to the northeast. As the tow, northbound, passed the channel mile post 620 and was between U.S. Engineer Nos. 306 and 307, the port forward corner of the Barge went aground on or near the left (upbound) channel bank. Either this or the Tug's efforts to slide off the strand, or a combination of both, caused the deck cargo to shift, listing the Barge more sharply to starboard with 90% of the cargo sliding into the canal.

According to the Tug's Captain (Savoy) testimony both in pretrial deposition and on his later court appearance, the Barge struck an unmarked, unknown shoal within the defined limits of the navigable channel. The shoal presumably had been formed through surface drainage of

soil off the nearby cut banks. On this hypothesis, the Tower could then argue forcibly those cases which exonerate the Tug from striking an unknown, unmarked object in the channel. *Exner Sand & Gravel Corp. v. Gallagher Bros. Sand & Gravel Corp.*, 2 Cir., 1946, 157 F.2d 291, 1946 AMC 1449; *The I.L.I. No. 103*, 2 Cir., 1939, 104 F.2d 650, 1939 AMC 927; *The Arlington*, 2 Cir., 1927, 19 F.2d 285, 1927 AMC 900. This theory got a substantial boost from an unexpected quarter. A marine surveyor, Dierlam, retained by and acting for the cargo underwriter (who is the subrogated libellant here) went to the scene of the casualty. His initial formal report to his principals stated that the "barge was found to be grounded on a silt or sand formation which, apparently, had built up on the edge of the west side of the channel bank from land drainage." The shipper-cargo owners in submitting proof of loss to the underwriter (libellant-appellee here) described the occurrence in similar terms. The "* * * barge LTC #6 * * * was stranded at about mile 620 in between markers 306 and 307, intracoastal waterway, the barge struck sand bar on the left side of the canal and went hard aground. * * *." But by trial time Surveyor Dierlam had changed his mind, primarily as a result of a study of the U.S. Engineer cross sections for stations 306 through 307. These cross sections (at 50-foot intervals) were prepared from soundings in August 1956, some four to five months after the stranding during which time it was undisputed no dredging had been done. Contrary to Tower's claim, these showed no shoal out into the defined channel limits.

Without a doubt the actions and reports of the Surveyor Dierlam, made by one whose job was to investigate and *report*, constituted admissions to prove the truth of the

declarations made.[4] But except for those specialized, rare assertions characterized as judicial admissions, a party is entitled to explain an admission and even to retract it. When that is done, the factual evaluation of the admission *vis-a-vis* explanation, retraction, or repudiation, is for the trier of the fact.

In that process many things are pulling in different directions here. Thus, for example, the Tower rightly emphasizes the interval nature of cross section soundings and the inability of them to portray accurately in detail the whole contour of the channel limits and bottom. This infirmity is augmented because fixing of the location of the casualty in terms of stations 306-307 is at best an estimate. But most significant, Surveyor Dierlam's job was to ascertain cause, both in an operational and legal sense, and after full opportunity to make full inquiry on the scene, he accepted without reservation the Tug's story. On the other hand, strong factors offset or overcome these considerations. One, of course, is the burden resting on the Tug to come forward with a plausible explanation for having stranded during calm weather on a clear night in a waterway having over 150 feet of navigable channel. *Bisso v. Waterways Transp. Co.*, 5 Cir., 1956, 235 F.2d 741, 744, 1956 AMC 1760, 1763. The Captain was, to be sure, adamant in his testimonial insistence that he was not out of the channel. But the trier was entitled to make something more out of his statements given to Surveyor Dierlam on the spot. After first stating that the Barge "nosed

[4] See, e.g., Compagnie De Navigation Fraissinet & Cyprien Fabre, S.A. v. Mondial United Corp., 5 Cir., 1963, 316 F.2d 163, 171 n.10; Employers Mut. Cas. Co. v. Mosqueda, 5 Cir., 1963, 317 F.2d 609, 612-13; Local 787, Int'l Union of Elec. & Mach. Workers v. Collins Radio Co., 5 Cir., 1963, 317 F.2d 214, 219 n.10; Cox v. Esso Shipping Co., 5 Cir., 1957, 247 F.2d 629, 632-34, 1957 AMC 1927. See generally McCormick, Evidence §244 (1954).

close enough to the channel bank that she struck a sand bar on the lefthand side (going north)," the Captain spoke as the voice of the Tower[5] in expressing the fact-conclusion "I believe this casualty occurred because there were insufficient channel lites to help me keep in the center of the channel." The Captain insisted, of course, that reference to "the lefthand side" meant within the channel limits. But when asked on the trial to estimate how far the Tow was from the center of the channel when the port corner of the Barge touched ground, he could give no estimate. And critical as it was to exculpate a Tow which grounded in calm, clear conditions in a channel of abundant depth and width, *Bisso v. Waterways Transp. Co., supra,* there was a complete failure to make any sounding of any kind at the scene of the casualty while Tug, Barge, Captain, and Surveyor were all there. The trier of the fact was entitled to conclude that the Captain tipped off the real reason for the grounding in his complaint about channel lights. That statement revealed that in the Captain's own mind he must have strayed too far from the center. It did not reveal—nor could it—how the existence of channel lights could have revealed a shoal which was completely submerged and wholly undisclosed. The point of this is not, as asserted by Cargo, that the failure of the Tow to navigate in the center of the channel was an independent ground of negligence. Rather, it is that the farther the tow was from the center, the closer it was to the edge of the defined channel, the exact location of which was difficult, if not impossible, to locate on the surface of the waterway. The permissibility of this inference is cumulatively supported by ample evidence of

[5] Fall v. Esso Standard Oil Co., 5 Cir., 1961, 297 F.2d 411, 417, 1962 AMC 951, 959, cert. denied, 1962, 371 U.S. 814, 83 S.Ct. 24, 9 L.Ed.2d 55; June T., Inc. v. King, 5 Cir., 1961, 290 F.2d 404, 406, 1961 AMC 1431, 1433.

other fault, particularly with respect to the failure to maintain a proper lookout considering the high deckload.

Affirming, as we do, the finding of negligent towage, the alternate Harter Act error-in-navigation defense, based on identical facts between identical parties, involves the identical question disposed of in our former decision.[6] The Tower urges that we reconsider.

In this undertaking which perhaps reckons with a mixture of the law-of-the-case principle, *Lincoln Nat'l Life Ins. Co. v. Roosth*, 5 Cir., 1962, 306 F.2d 110 (en banc), and stare decisis, the Tower with a good deal of basis throws added doubt on the correctness of our still earlier decision in *Mississippi Valley Barge Line Co. v. T. L. James & Co.*, 5 Cir., 1957, 244 F.2d 263, 1957 AMC 1647, cert. denied, 355 U.S. 871, 78 S.Ct. 121, 2 L.Ed.2d 76, on which *The R. A. Turrentine* was based. To the doubts generated by Chief Judge Tuttle's special concurrence, 279 F.2d 811, 815, the Tower adds supposedly contrary results reached in these cases: *Continental Grain Co. v. American Commercial Barge Line Co.*, 7 Cir., 1964, 332 F.2d 26, 1964 AMC 1830; *Allied Chemical Corp. v. Gulf Atlantic Towing Corp.*, E.D.Va., 1964, 1965 AMC 776; *Pure Oil Co. v. M/V CARIBBEAN*, W.D. La., 1964, 235 F.Supp. 299. And to these we think the action of the Supreme Court in *Southwestern Sugar & Molasses*[7] saps pretty generally whatever vitality remained in *T. L. James* so far as the status of carrier

[6] The R. A. Turrentine v. American Home Assur. Co., 5 Cir., 1960, 279 F.2d 811, 1960 AMC 1429, cert. denied, 364 U.S. 914, 81 S. Ct. 278, 5 L.Ed.2d 28, rehearing denied, 364 U.S. 944, 81 S.Ct. 463, 5 L.Ed.2d 376.

[7] Southwestern Sugar & Molasses Co. v. River Terminals Corp., 1959, 360 U.S. 411, 79 S.Ct. 1210, 3 L.Ed.2d 1334, 1959 AMC 1631, affirming in part and remanding in part, 5 Cir., 1958, 253 F.2d 922, 1958 AMC 534. For opinion or remand see 5 Cir., 1960, 274 F.2d 36, 1960 AMC 2064.

versus tower turned on independent ownership of the tug and of the barge being physically towed. In each case the barge was shipper-owned and the ICC tariffs of these regulated certificated carriers treated the resulting cargo liabilities specially. In *T. L. James* we held, in effect, such exoneration to be void as a matter of law. In *Southwestern Sugar & Molasses*, the Supreme Court affirmed our decision[8] that validity was a matter first to be determind by the ICC under the primary jurisdiction doctrine.

But to recognize that the signal from *T. L. James* is weak does not carry the day. At the oustet, this loose, informal, oral arrangement revealed by the facts of these two identical records does not compel a holding by the trier of fact, *cf. F.R.Civ.P.* 52(a), that the Tower undertook to accept and perform all of those obligations and responsibilities characterizing a carrier,[9] i.e., one engaged in the transportation of cargo as distinguished from the more limited role of supplying towage.

More important, even making the double assumption that the arrangement gave Tower the status of a carrier and that it was therefore an implied party to the bill of lading issued by Magco Towing Company is insufficient. The Harter Act is not self-executing. For private carriage it must be invoked and admittedly that was done here, if at all, through incorporation by reference. We adhere to our former holding that the incorporating condition "if this is a rail or rail-water shipment" was not met by an *all*-water movement. See 279 F.2d 811, 814. This is but an application of the familiar principle that in the absence of a contrary contractual provision, the law holds one en-

[8] 253 F.2d 922, 1958 AMC 1534.

[9] Ownership of transportation facilities is seldom a decisive factor, cf. Agricultural Transp. Ass'n v. King, 5 Cir., 1965, 349 F.2d 873.

gaged in private carriage to the traditional standard of due care. No paper—no contract—to which Tower was a formal or implied party undertook to alter this standard. It, first, failed somehow to make itself a third-party beneficiary to Magco Towing Company's contract. More than that, Magco Towing Company's contract did not prescribe the less exacting standard as such. It only incorporated the Uniform Bill of Lading—a document designed for ICC certificated rail carriers and their liabilities for shipments moving partly by water. 49 USCA §1(1)(a).

The Tower failed to establish to the satisfaction of the trier of the fact that it had in fact invoked the Harter Act in the contractual arrangement between the parties. The Harter Act defense therefore fails.

This leaves the tag-end attack on the allowance of surveyor's fees and expenses to Surveyor Dierlam in the amount of $841.57. Although the record is technically deficient perhaps in giving this item the true status of a subrogation claim since the Libellant-Appellee paid it direct to Surveyor Dierlam, we think in view of the equitable nature of the doctrine of subrogation that this deficiency can be remedied on the remand required in connection with this small part of the claim. The Tower is correct that in so far as Surveyor Dierlam was acting solely in behalf of the Carrier Underwriter's interest, the fee in connection with a cargo claim is not allowable.[10] But to the extent that Surveyor Dierlam's actions and expenses were reasonably attributable to the action of a prudent uninsured

[10] Tower urges these cases: Galveston Towing Co. v. Cuban S.S. Co., 5 Cir., 1912, 195 Fed. 711, 714; The Venus, S.D.N.Y., 1883, 17 Fed. 925, 928; The Benjamin A. Van Brunt, E.D.Pa., 1925, 3 F.2d 655, 658; The Priscilla, 1 Cir., 1932, 55 F.2d 32, 37, 1932 AMC 334, 335.

cargo owner in the care, protection, and salvage of the cargo lost or damaged, it certainly ought to be allowed.[11]

This brings to mind what we said in *Bros Inc. v. W. E. Grace Mfg. Co.*, 5 Cir., 1963, 320 F.2d 594, 597: "Hearkening as we should to the principle epitomized in Justice Story's apothegm that 'It is for the public interest and policy to make an end to litigation * * *' so that '* * * suits may not be immortal, while men are mortal,' * * * we nonetheless conclude that before the curtain falls on this juridical drama, there must be another act." Now this old, old case must go back for yet another round on this very, very limited issue. Indeed, judging from the past, it might be rounds, not round.[12]

But hastening the day when, as it "must to all living things, an end comes to this case * * *,"[13] we expressly affirm the District Court's allowance of all items of damages —except the surveyor's fee—with interest. As to the surveyor's fee, the case is reversed and remanded for further, consistent proceedings and for the entry of a proper decree with interest

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

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[11] Cargo urges these cases: The James McWilliams, 2 Cir., 1930, 42 F.2d 130, 1930 AMC 1055; Cargill, Inc. v. The Frank A. Lowery, N.D.N.Y., 1957, 159 F.Supp. 133, 1957 AMC 1563, aff'd, 2 Cir., 1958, 251 F.2d 845, 1958 AMC 842, cert. denied, 356 U.S. 951, 78 S.Ct. 917, 2 L.Ed.2d 845; The Raleigh, D.Md., 1943, 50 F.Supp. 961, 1943 AMC 1016; The Feltre, D.Ore., 1939, 1939 AMC 1173; Mulqueen v. Hedger Transp. Co., S.D.N.Y., 1933, 1935 AMC 1247, 1248.

[12] After our remand in **The R. A. Turrentine** to determine whether the Tug should be compensated for hire, we again had the case on the Tower's unsuccessful appeal from the District Court's allowance of interest from date of the decree. Brown & Root, Inc. v. American Home Assur. Co., 5 Cir., 1963, 321 F.2d 814, 1964 AMC 69.

[13] Bros Inc. v. W. E. Grace Mfg. Co., 5 Cir., 1965, . . .F.2d . . ., . . . [No. 21470, decided September 14, 1965].

APPENDIX II

MEMORANDUM OPINION:

(Filed October 26, 1962)

(Caption Omitted)

On or about March 28, 1956, while the Tug R. A. TURRENTINE was towing Barge LTC No. 6, the tug ran aground in the Intracoastal Canal and the barge listed at an angle of about 45 degrees, resulting in the shifting of the cargo belonging to Libelant which consisted of drilling mud that was of barite ore and was dissolvable and did dissolve as it went into the water. The cargo was in metal cans or containers and also in paper bags.

Libelant is the insurance carrier for Magcobar, Inc., Magnet Cove Barium Corporation, and Magco Towing Company, and became subrogated to this action to the extent of such payment against Brown & Root, Inc., and its Tug R. A. TURRENTINE. Libelant alleges various acts of negligence on the part of the crew of the tug, and particularly in not maintaining any lookout or a proper lookout, and in causing said Barge LTC No. 6 to strand outside the navigable channel of the Gulf Intracoastal Waterways and in negligently maneuvering in an endeavor to free Barge LTC No. 6 from her strand as to cause said barge to list to her starboard at an angle of about 45 degrees and dump the large part of the cargo of said barge.

Respondents answer and have a number of defenses, all of which, except two, have been decided contrary to Respondents' theories in a companion case between the same parties involving the same tug and also involving a similar shipment except for the fact that the other shipment was contained entirely in paper sacks, the same loss of cargo occurring also in the same channel. The companion case

was filed in the Corpus Christi Division and was decided by Judge James V. Allred in written opinion dated December 30, 1958. Thereafter, on appeal, the 5th Circuit affirmed Judge Allred in 279 F.2d 811. Thereafter, a petition was filed in the Corpus Christi case for a writ of certiorari to the Supreme Court of the United States which was denied as reported in 364 U.S. 914, and a petition for rehearing on said matter was denied by the United States Supreme Court reported in 364 U.S. 944.

In said opinion the contractual and statutory defenses listed in Respondents' answer were fully and finally decided adversely to the contentions of the Respondents herein. The Corpus Christi case decided that there was no provision for giving to Brown & Root the benefit of any insurance procured by Libelant's assureds, and it further held in that case that the defenses afforded by the Harter Act were not available to Brown & Root under the contract of towage or any other contractual agreement between Brown & Root and Libelant's assureds.

It further held that the contract of Brown & Root was for towage and not for affreightment, and this being so, it could not as a carrier claim the benefit of the insurance.

The main difference in the Corpus Christi case and the instant case is that the Respondents claim that the barge was negligently loaded. On this point Judge Brown in the case of *Bisso v. Waterways Transportation Co.*, 235 F.2d 741, held that in the case of the stranding of a vessel, resulting in loss of cargo, that the barge was overloaded by the Libelants. That if this overloading did occur, it was the duty of the pilot in charge of the tow boat to refuse to accept the cargo, but if he did accept it, as was the case here, and casualty resulted, then the burden is on the tug to show at least a reasonable excuse for the accident other than its own negligence. Failing to do this, the Libelant

was entitled to a decree for damages. Here respondent did so fail.

The other question of difference from the Corpus Christi case and the instant case was an attempt to show an oral agreement which would be in the nature of an act for deceit and estoppel. Suffice to say, in my opinion, the Respondents completely failed to make any such proof.

I therefore hold as a matter of law that the tow was negligent in its handling of the barge and that such negligence was the direct and proximate cause of the stranding and the resulting damages to the cargo.

I further find that this court has jurisdiction over the parties and the subject matter of this suit.

I further find that the casualty did not result from any Act of God or inevitable accident and, further that the casualty was not attributable either to overloading or improper loading, and if it was improperly loaded, such a defect was so obvious that the tow should have discovered it before the voyage began.

And that, therefore, the tug is held solely at fault for the accident and resulting damages, including the necessary & reasonable cost of marine surveyor's fees in the sum of $841.57, for costs of court and for damages to cargo in the sum of $31,430.49, plus interest from the date of the casualty, and that the Respondent Brown & Root take nothing by its Impleaded Petition against Impleaded Respondents.

The above will constitute the findings of fact and conclusions of law in this case.

Clerk will notify Counsel.

/s/ ALLEN B. HANNAY
United States District Judge

APPENDIX III

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21766

BROWN & ROOT, INC.,
Appellant

versus

AMERICAN HOME ASSURANCE COMPANY,
Appellee

Appeal from the United States District Court for the Southern District of Texas.

(December 29, 1965)

ON PETITION FOR REHEARING

Before BROWN and COLEMAN, Circuit Judges, and MORGAN, District Judge.

PER CURIAM:

It is ORDERED that the Petition for Rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1965

No. 21,766

D. C. Docket No. Adm. 1472
BROWN & ROOT, INC., Appellant,
versus
AMERICAN HOME ASURANCE COMPANY,
Appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN and COLEMAN, Circuit Judges, and MORGAN, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby, affirmed in part, and reversed in part in accordance with the opinion of this Court; and that this cause be, and it is hereby remanded to the said District Court in accordance with said opinion;

It is further ordered and adjudged that the appellant, Brown & Root, Inc., be condemned to pay 90% of the costs of this cause in this Court, and appellee, American Home Assurance Company, be condemned to pay 10% of said costs, for which execution may be issued out of the said District Court.

November 23, 1965

Issued as Mandate: JAN. 6, 1966

1 37

THIS MEMORANDUM is an acknowledgment that a Bill of Lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading,

APPENDIX IV

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its route, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in Official, Southern, Western and Illinois Freight Classifications in effect on the date hereof, if this is a rail or rail-water shipment, or (2) in the applicable motor carrier classification or tariff if this is a motor carrier shipment.

Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof, set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

CARRIER'S No. _____

SHIPPER'S No. _____

DATE SHIPPED	CAR OR VEHICLE INITIALS & NO.

At

From **MAGNET COVE BARIUM CORPORATION**

CONSIGNED TO

(Mail or street address of consignee—For purposes of notification only)

DESTINATION

CARRIER

ROUTING

Subject to Section 7 of Conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor)

If charges are to be prepaid, write or stamp here, "To be Prepaid"

Received $_____ to apply in prepayment of the charges on the property described hereon

Agent or Cashier

Per

(The signature here acknowledges only the amount prepaid)

Charges Advanced:

$

Number Packages	Package Size		NUMBER OF UNITS	PER*	*ROD. CODE	KIND OF PACKAGE, DESCRIPTION OF ARTICLES SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Sub to Cor.)	Class or Rate	Ck. Col.

"Shipper's imprint in lieu of stamp; not a part of bill of lading approved by the Interstate Commerce Commission"

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

per

The Fibre Boxes used for this shipment conform to the specifications set forth in the box maker's certificate thereon, and all other requirements of Consolidated Freight Classification.

"If Intrastate consignment, then the provisions hereof shall be subject to the laws of Texas; all provisions not expressly restricted by such laws shall be applicable to this shipment."

MAGNET COVE BARIUM CORPORATION, Shipper,

_____ Agent

Per _____

Per _____

Permanent postoffice address of shipper, HOUSTON, TEXAS, U. S. A.

APPENDIX V

UNIFORM DOMESTIC STRAIGHT BILL OF LADING

CONTRACT TERMS AND CONDITIONS

. . .

Sec. 9. (a) If all or part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 1193

BROWN & ROOT, INC., *Petitioner*

-versus-

AMERICAN HOME ASSURANCE COMPANY,
Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

CARL G. STEARNS
E. V. GREENWOOD
Attorneys for Respondent

900 Travis Street
Bank of the Southwest Bldg.
Houston, Texas 77002

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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BRIEF FOR RESPONDENT IN OPPOSITION

ARGUMENT

The petition in this matter arising under the general maritime law presents questions for review that are essentially, if not entirely, *factual* in nature and, with all due respect, as such do not merit the attention of this Honorable Court.

Argument on Petitioner's First Question

Petitioner's first question attempts to dignify the matter of *factual* provability as damages of an $841.57 marine surveyor's fee[1] by asserting that it raises a fundamental question as to the nature of an insurer's right to subrogation. Petitioner contends that because the insurer paid the fee in the first instance, rather than insisting that the insured pay it and claim reimbursement, even such portion of the fee as constituted "expenses . . . reasonably attributable to the action of a prudent uninsured cargo owner in the care, protection, and salvage of the cargo lost or damaged" is not recoverable. Considering the equitable nature of subrogation, we submit that the courts below were patently correct in sustaining recoverability, but if such be thought not to be the case, then it would appear that this question is at least prematurely presented for the reason that, pending the outcome of the remand ordered by the Fifth Circuit, it cannot even be said with certainty that any part of the fee will be found to be recoverable.

Argument on Petitioner's Fourth Question

Petitioner's fourth question is purely *factual* in character, each of the courts below having twice considered the evidence as to the place where the tortious stranding occurred and each having found the *facts* contrary to petitioner's contentions in this respect and others sufficient to sustain petitioner's liability.

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[1] Judge John R. Brown quite appropriately labeled petitioner's contentions on this question as a "tag-end attack". (Petition of Certiorari, Appendix I, p. 29). Hereafter, citations to the Petition for Certiorari in this case will be made by use of the abbreviation "Pet.", followed by the page number to which reference is made.

Argument on Petitioner's Second and Third Questions

Petitioner's second and third questions were first carefully considered in a sister case[2] by the late Judge James V. Allred of the Southern District of Texas, later twice[3] by the Fifth Circuit, and still later twice[4] by this Honorable Court. On each occasion the result was adverse to petitioner's contentions. In the case at bar Judge Allen B. Hannay of the Southern District of Texas carefully considered these same questions following the trial on the merits[5] and again upon petition for rehearing.[6] Thereafter, the Fifth Circuit, with the full benefit of all of the decisions cited by petitioner, rendered its Opinion below, carefully reconsidering its former decision in the light of petitioner's authorities, and once again sustaining the previous decision.[7] Thereafter rehearing was again denied.[8]

Petitioner's problems in connection with its second and third questions are manifold, serious and determinative

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[2] **American Home Assurance Company v. Tug R. A. Turrentine, her engines, etc., and Brown & Root, Inc., etc.** (U.S.D.C., S.D. Texas, 1958). Judge Allred's Opinion is set forth at length as Appendix "A" to this brief. This case is sometimes hereinafter referred to as the "Corpus Christi Case", since it was tried in that city.

[3] **The R. A. Turrentine v. American Home Assurance Co.** (5 Cir., June 13, 1960, rehearing denied July 15, 1960) 279 F.2d 811.

[4] Certiorari denied, 364 U.S. 914, 81 S.Ct. 278, rehearing denied, 364 U.S. 944, 81 S.Ct. 463.

[5] Judge Hannay's original Memorandum Opinion filed October 26, 1962, appears at Pet., Appendix II, pp. 31-33 and R. 697-699.

[6] To deal with petitioner's motion for rehearing in the trial court, Judge Hannay filed under date of November 18, 1963, an Amended Memorandum Opinion, which is set forth at length as Appendix "B" to this brief. It also appears at R. 727.

[7] The opinion below is set forth at length at Pet., Appendix I, pp. 21-30

[8] See Pet., Appendix III, p. 34.

against it. First of all, as Judge Allred and the Fifth Circuit found in the Corpus Christi case, and as Judge Hannay and the Fifth Circuit found in the case at bar, the contract involved in this litigation was *as a matter of fact* towage—not carriage or affreightment. For that matter, petitioner in its original answer (R. 19) and in its amended answer (R. 160) to the libel in the case at bar conceded, in fact emphasized, that the engagement was for towage only. Furthermore, the towage contract was oral and did not contain a Harter Act, stranding or similar defense. The witnesses to the making of the contract both testified that the agreement was for towage. See the testimony of Mr. Buyher for respondent on this point (R. 214 ff.) and of Mr. Davis for petitioner (R. 614-615). Furthermore, the Harter Act in terms applies only to carriers—not towers (46 U.S.C.A. Sec. 192).

Secondly, even if a carriage contract were involved (contrary to the evidence, respondent's contentions and the *fact* findings of all of the courts below), neither petitioner nor its tug were parties to any such contract (See the last page of J. Allred's Opinion in the Corpus Christi case (Appendix "A" hereto), Judge Tuttle's concurring opinion in the Fifth Circuit reported in 279 F.2d 811 at 815-816, Judge Hannay's opinion (Pet. 32) and Judge Brown's opinion (Pet. 28) in the Fifth Circuit).

Thirdly, even if, contrary to the foregoing, petitioner and its tug were entitled to the bill of lading defenses, the bill of lading in this case was a short form bill of lading by its terms only incorporating the Uniform Domestic Straight Bill of Lading (essentially a railroad bill of lading) "if this is a rail or rail-water shipment" (See petitioner's Appendix IV and the opinions of the Fifth Circuit, 279 F.2d 811 at 814 and Pet., Appendix I, p. 28). Since no

such shipment was involved here, it is a matter of plain *fact* that the terms of the Uniform Domestic Bill of Lading were not incorporated by reference, the conditions of incorporation not having been met. There is no ambiguity here, as suggested by petitioner.

In addition to the foregoing (any one of which reasons is, we respectfully submit, a sufficient basis for denying petitioner and its tug the Harter Act defenses), in the case at bar there is still another reason why petitioner must fail, namely, that petitioner and its tug are estopped by the judgment in the prior *Corpus Christi case* on these same questions and between these same parties (though the latter case involved a different cause of action). Authorities on this point, among others, are the following:

(1) *Cromwell v. County of Sac* (1877) 94 U.S. 351, 24 L.Ed. 195;
(2) *Partmar Corp. v. Paramount Theatres Corp.* (1954) 347 U.S. 89, 98 L.Ed. 532;
(3) *Vanderveer v. Erie Malleable Iron Company* (3 Cir., 1956) 238 F.2d 510;
(4) *Connelly v. Balkwill* (N.D. Ohio, 1959) 174 F.Supp. 49; and
(5) *Clinton Engines Corp. v. Briggs & Stratton Corp.* (E.D. Mich., 1959) 175 F.Supp. 390.

As a final reason why petitioner and its tug are not entitled to the asserted defenses, if indeed another reason be required, same is present in the fact that the *Corpus Christi case* is an "all fours" white horse case in which three different courts refused to hold for petitioner on these questions. Petitioner has certainly set forth no sound reason, and we respectfully submit that none exists, why the decisions in this matter should be changed after ten years of careful litigation, during the course of which all

of petitioner's arguments and authorities have been passed on in one form or another and found wanting. We respectfully submit that this Honorable Court should at this very late date find no reason to reconsider the facts and the authorities on these questions.

CONCLUSION

In Appendix "C" hereto, for the convenience of this Honorable Court, is printed in full the statement of Captain H. E. Savoy of the Tug R. A. TURRENTINE given and signed by him on or about March 29, 1956, the day following the stranding and resultant dumping of cargo made the subject of this litigation. Such statement shows on its face, we respectfully submit, some very good reasons why, as a matter of fact and as a matter of law, Judge Hannay and the Fifth Circuit both held, and on rehearings adhered to such holding, that respondent should recover its damages in the case at bar. Today, more than ten years after the making of that statement, and after the principal questions of fact and law have been considered at least once, and more often twice, by each of six separately constituted Federal Courts, petitioner is still denying liability. The writ of this Court to further review this cause is not merited by the record, and therefore should be denied.

Respectfully submitted,

CARL G. STEARNS
E. V. GREENWOOD
Attorneys for Respondent

April, 1966

APPENDIX "A"

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS,
CORPUS CHRISTI DIVISION

AMERICAN HOME ASSURANCE COMPANY,
Libellant

vs.

TUG R. A. TURRENTINE, HER ENGINES, ETC.,
and BROWN & ROOT, INC.,
Respondents

vs.

MAGCO TOWING COMPANY, INC., MAGCOBAR,
INC., and MAGNET COVE BARIUM CORPORATION,
Impleaded Respondents

A. D. 182

EDMUND J. FORD JR.,
ROBERT T. RILEE II,
1517 Wilson Tower,
Corpus Christi, Texas
PROCTORS FOR LIBELLANT
and IMPLEADED RESPONDENTS

ROBERT EIKEL,
1910 Commerce Bldg.,
Houston 2, Texas,
PROCTOR FOR RESPONDENT
Brown & Root, Inc.

December 30, 1958

Libellant was the insurer of a cargo of drilling mud owned by Magcobar, Inc. (hereafter called Magcobar) and Magnet Cove Barium Corporation (hereafter called Magnet Cove). This cargo was lost while being transported from Brownsville, Texas, to Corpus Christi, Texas, on the barge LTC 6 which was under a bareboat charter to Magco Towing Company (hereafter called Magco Towing). Magco Towing had issued a "shipping order-short form bill of lading-memorandum" showing Magnet Cove as the shipper. Magcobar, Magnet Cove and Magco Towing are affiliated companies.

The loaded barge was being towed by the Tug R. A. Turrentine under a verbal contract of towage entered into some months before with Magco Towing whereby the tug was to tow the loaded barge from time to time for a given sum of money (in this instance $900). The barge was to be loaded by the employees of the Magco companies with cargo belonging to one or more of them and then towed by the Turrentine, in her exclusive custody and control. In this instance it had been so loaded by Magco Towing at Brownsville and pushed up the intercoastal canal and out into Corpus Christi Bay in the face of warnings of squally weather and rough wind and water. One of the cables holding the barge to the tugboat broke. The master of the tug cast off his pushing cables and connected to the barge in a towing position. In maneuvering the barge so as to regain its heading toward the city docks it listed and the cargo was lost.

Libellant, as insurer of the cargo, paid the loss and brought this proceeding claiming subrogation against the Tug Turrentine and its owners, alleging both unseaworthiness and negligence in a number of respects. Respondents

filed a petition under Admiralty Rule 56, impleading the Magco companies, alleging that under its agreement with Magco Towing the Tug "was simply to perform *towing services*, and the barge was to carry cargoes of the impleaded respondents, the tug having no responsibility except to *tow*, all responsibility with reference to the *loading, stowing and caring* for the cargo aboard the barge being the responsibility of impleaded respondents."[1] The Tug asked for decree against the impleaded respondents upon various grounds.

A pretrial hearing was held and an order entered reciting that the contract between Magco Towing and the Tug was for the *towing and transporting of the barge*, that Magco Towing was to load the barge and the Tug was to "furnish *towing services*." The issues to be tried were stipulated to be as follows:

(1) The negligence, if any, of the crew of the tug in *towing* of the barge or operation of the tug upon the voyage in question;

(2) The seaworthiness of the barge and its fitness to carry the cargo in question;

(3) The negligence, if any, of the agents and employees of MAGCO TOWING COMPANY, INC., in the loading of the cargo in question upon the barge;

(4) Whether such negligent acts or omissions, if any, and unseaworthiness, if any, proximately caused the loss sued upon;

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[1] Emphasis supplied throughout this memorandum unless otherwise indicated.

(5) The terms of the agreement for the *towing* of the barge, and the legal effect thereof; and

(6) The legal effect of the corporate status and relationship of Magnet Cove Barium Corporation, Magcobar, Inc., and Magco Towing Company, Inc.

Trial was had before the court and, after argument, a tentative finding of negligence upon the part of the Turrentine was announced from the bench but counsel were given time for the filing of briefs. The court now makes the following findings of fact:

(1) The Tug R. A. Turrentine was negligent in the following respects:

(A) The master was not sufficiently skilled to undertake the tow; (B) Free surface water was placed in the rake tanks of the barge in an improper manner, rendering the barge unseaworthy by reason of such negligence on the part of the crew; (C) In proceeding into Corpus Christi Bay under the existing conditions and continuing there instead of returning to, or seeking, sheltered water; (D) In making up the tow, after the breaking of the cable, so as to "tow" rather than continue to push the tow.

(2) Each and all of the foregoing acts of negligence was a proximate cause of the listing of the barge and the loss of its cargo.

(3) The barge was seaworthy and fit to carry the cargo which was properly loaded for the transportation to Corpus Christi had it not been for the negligence of the Tug and its crew which rendered the barge unseaworthy after it came under the exclusive control of the Tug; and

(4) The agents and employees of the Magco companies were not negligent in any respect in the loading of the barge and cargo.

Respondents' first defense is that there is no liability by reason of section 3 of the Harter Act (46 U.S.C.A. 192) which provides in substance that the owner of any vessel transporting merchandise or property, who exercises due diligence to make the vessel seaworthy and properly manned, etc., shall not be liable for loss resulting from faults or errors in navigation or management of the vessel. Section 3, however, applies to affreightment, not towing, contracts;[2] and, of course, standing alone, Respondents oral contract was one of *towing* only, as shown by the pleadings, the pretrial order and the facts emphasized above.

Respondents insist that this is a contract of affreightment, not of towing, pointing to (1) a provision in the pretrial order that "Any defense of the Respondents . . . to the claim of each of said corporations[3] as to American Home Assurance Company is a defense to its right by reason of subrogation"; (2) that Libellant sues as subrogee of the owner of the lost cargo; (3) that payment of the insurance was made to the owners of the cargo, Magnet Cove and Magcobar, not to Magco Towing; (4) that the suit here is basically one by the cargo owners against the carrier, Magco Towing, not upon the towing contract which respondents made with Magco Towing; (5) and that the shipping order-short form bill of lading-memorandum called for a Uniform Domestic Straight Bill

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[2] Mississippi Valley Barge Line Co. v. T. L. James & Co., Inc., (D.C. La.) 144 F. Supp. 662, affirmed, 5 Cir., 244 F.2d 263.

[3] The Magco affiliated companies.

of Lading,[4] all of which show a contract of affreightment. But all of these arguments cannot alter the fact that Respondents' contract was for *towing, not affreightment.* While ". . . a towage contract may be covered by the Harter Act where it actually is one of 'affreightment' rather than 'towage'—i.e., where the shipper simply places his cargo in the custody of the barge-owner, who proceeds to tow it to destination",[5] no such situation exists here. Respondents were careful to stipulate and emphasize in pleadings and oral argument that they did not contract to transport goods, or have anything to do with the cargo, but to *tow* a loaded barge. Indeed one of the principal points, strenuously argued but now not stressed, was that the cargo was improperly loaded, that Respondents' agents called attention to it but had an agreement that they were not to be liable. It is significant that the pre-trial stipulations and order did not name as one of the issues to be tried *the terms of the contract between the shippers and Magco Towing* but only "the terms of the agreement for the *towing* of the barge and the legal effect thereof".

In the cases cited by Respondents in which it was held that the contracts were for affreightment, not towage, there either was common ownership of the tug and the barge[6] or an ownership pro hac vice where the owner of

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[4] Reading in part as follows: ". . . that every service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (one) in official Southern, Western and Illinois freight classifications in effect on the date hereof, if this is a **rail** or a **rail-water** shipment, or (two) in the applicable motor carrier classification or tariff **if this is a motor carrier shipment**".

[5] Gilmore and Black "The Law of Admiralty", citing Sacramento Navigation Co. v. Salz, 273 U.S. 326.

[6] Sacramento Navigation Co. v. Salz, Supra.

the tug had the barge under a time charter and was entitled to receive the freight[7] or an arrangement between the tug and barge whereby they were to split the freight.[8] None of these factors are present in the case at bar.

Respondents' next contention is likewise contingent upon their right to the benefits of the shipping order-short form bill of lading-memorandum between Magnet Cove and Magco Towing which contained the provision that it should be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading, etc., set out in footnote 4, supra. This Uniform Domestic Straight Bill of Lading carries many "contract terms and conditions" in fine print on the back, among which is Sec. 2(c), providing that "Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, that the carrier reimburse the claimant for the premiums paid thereon".

Respondents contend (1) that since Magcobar and Magnet Cove, the shippers, had insurance on the cargo which Libellant paid off, therefore Magco towing had the right to benefit from such insurance;[9] that Respondents would have the right to set off such fact as a defense against Magco Towing and, therefore, may assert it against Libellant, subrogee of the affiliated companies; and (2),

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[7] The Vale Royal, (D.C., Md.) 51 F.Supp. 412, 1943 A.M.C. 1099.

[8] Towanda Iron Corp. v. The Marmor, (D.C., N.Y.), 56 F. Supp. 435, 1943 A.M.C. 1380.

[9] Citing 24-B Tex. Jr. 808, sec. 401; Missouri Pacific Ry. Co. v. International Marine Insurance Co., 84 Tex. 149 19 S.W. 459.

that if the policy contains a provision voiding it in the event of a provision whereby the carrier is to have the benefit of insurance, then Libellant was not liable to pay the insurance and, being a volunteer, may not recover.[10] But again, I think, Respondents may not benefit from these provisions, not being a party to the shipping order-short form bill of lading-memorandum. To permit Respondents to escape liability for their negligence under the circumstances existing here would be as unjust as to deny recovery in any other case where a party had insurance covering the loss.

Proctors for both Libellants and Respondents make many other contentions, but it is not necessary to discuss them in view of the foregoing, which are adopted as findings of fact and conclusions of law.

/s/ JAMES V. ALLRED

Wichita Falls, Texas. Judge

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[10] Citing Insurance Company of North America v. Easton, 73 Tex. 167, 11 S.W. 180, 3 L.R.A. 424.

APPENDIX "B"

AMENDED MEMORANDUM OPINION

(Filed Nov. 18, 1963)

(Caption Omitted)

After the Memorandum Opinion was filed herein, Mr. Robert Eikel, Proctor for Respondents, who had failed to file a brief in this case, requested permission that the Court refrain from acting upon his petition for rehearing until he could have a complete transcript of the testimony prepared and furnished the Court. This request was granted. Mr. Eikel then filed a brief on the merits of the case. The Court has carefully read the transcript of the testimony and studied the brief and the cases therein cited.

The Court hereby over-rules and denies the petition for a rehearing and makes the following changes in the original Memorandum Opinion, to-wit:

1. On page 1, the second word in the next to the last line, is changed from "obligated" to "subrogated";

2. On page 3, the second word in the last sentence of the first paragraph, is changed from "Libellant" to "Respondents";

3. On page 3, in the second line of the last paragraph, the words "necessary and reasonable" are inserted just before "cost of marine surveyor's fees".

Otherwise, the Memorandum Opinion heretofore filed remains unchanged.

Clerk will notify counsel.

/s/ ALLEN B. HANNAY
United States District Judge

APPENDIX "C"

Statement of the Captain of the Steel Diesel Tug "R. A. Turrentine" in regard to grounding of Barge "LTC #6" appx. 20 miles north of Port Mansfield, Texas.

My name is H. E. Savoy. My address is Route 4, Box 240, Corpus Christi, Texas. I am married. I have been captain and worker on tugs for the past about four and a half years. I have been captain of the "R. A. Turrentine" for about a year and a half. I consider the "Turrentine" a good tug with plenty of horsepower for the work she does.

We arrived in Brownsville Shrimp Basin on March 25, 1956 about 5:30 p.m. and were loaded with about 900 tons of Magcobar both in hopper type cans and palette (sic) loaded paper bags.

The cans were loaded in three sections or groups forward, midships, and aft with the pallette set on each side of the center load and each pallette group stacked three high.

Carl Boyher (possibly mispelled (sic)) who is superintendant (sic) of Magco Towing Co. in charge of loading, told me the loading was satisfactory and to go to Ingleside, Texas to unload the cans and then to go to Port Lavaca, Texas and unload the pallettes.

We made up our tow on the LTC #6 with the stem of the tug on the rake of the barge and secured with 3/4" wire cable to each aft bitt of the barge and then ran single 5/8" wire cable to the aft bitts of the barge. Each cable was drawn ratchet tight.

We left the dock at 5 AM on the twenty eighth of March 1956 and headed down the channel reaching the Intracoastal Canal about 7:30 a. m.

About 8 PM that same nite (sic) I took the wheel releiving (sic) W. A. Lock, the mate.

The wind was blowing from the north about twenty five or thirty miles an hour and the nite (sic) was clear enough that I could make out the channel for about three miles and we were making about four miles an hour.

About 10:15 PM that nite (sic) the wind had shifted more to the northeast and as we passed the channel marker 620 mile and between markers #306 and #307 U. S. Engineers the barge #LTC #6 nosed close enough to the channel bank that she struck a sand bar on the left hand side (going north) and I gave her a hard right rudder to try and slide off.

The barge then heeled over more to starboard and the cans started shifting after I immediately reversed the engine to try and back off but she went over further to starboard to about a forty five degree angle and the cans & palletes (sic) started sliding off the starboard side.

The tug heeled over to starboard also and one bow cable snapped.

I would say that about 90% of the cargo went overboard along with a Clark fork truck and a 2" Briggs & Stratton pump.

I decided not to move the barge in case we lost more cargo. We have layed (sic) here since we notified the R. M. Davis, Brown & Root marine supt. in Corpus Christi Texas by radio. He told me to standby and assist any tows to clear us that might pass by and that he would have a salvage crew down as soon as possible.

I believe this casualty occured (sic) because there were insufficient channel lites (sic) to help me keep in the center of the channel.

We, I believe, wouldn't have lost any of our load if the hopper cans had not shifted across the deck to starboard since they were not lashed down or blocked off in any way.

This is all I know.

/s/ H. E. SAVOY
H. E. Savoy, Captain
of Tug "R. A. Turrentine"

We have read the above statement and it is true and correct and complete to the best of our knowledge.

/s/ W. A. LOCK
W. A. Lock
Mate of "R. A. Turrentine"

/s/ ALCIDE TOUCHETTE
Alcide Touchette
Deck hand of
"R. A. Turrentine"